HASHIM DIN

v.

SATO KOGYO CO. LTD.

HIGH COURT MALAYA, ALOR SETAR
LIM BENG CHOON J
[CIVIL SUIT NO. 22-86-86]
8 SEPTEMBER 1987

CIVIL PROCEDURE: *Application by defendants to strike out writ and statement of claim - Grounds - No reasonable cause of action - Frivolous and vexatious - Summary power - Principle governing exercise of power - Affidavit evidence - Whether admissible in this application.*

TORT: *Trespass onto land - Removed red earth and consequently caused damage to the land - Whether trespass to land per se gives rise to action in tort - Doctrine of necessity - Defendants carrying out road project - Question of necessity and urgency in public interest in carrying out project - Whether defendants immune to charge of trespass - Defence of necessity - Whether available in this application or trial proper.*

CIVIL PROCEDURE: *Defendants alleged plaintiff by his conduct is precluded from alleging trespass - Conflicting evidence - Whether proper to deal in interlocutory proceedings special damages - Whether must be particularised.*

This was an application by the defendants for an order that the writ and the statement of claim be struck out pursuant to O. 18 r. 19(1) RHC 1980. The grounds of the application were

(1) there is no reasonable cause of action

(2) the action is frivolous and vexatious.

The plaintiffs' claim was that the defendants had trespassed onto two parcels of land of which the plaintiff was the registered owner. It was further alleged that the defendants had entered into the said land without the permission and consent of the plaintiff for the purpose of removing red earth therefrom and in so doing the defendants had also caused damage to the said land.

Held:

[1] It is trite law that the summary power under O. 18 r. 19 RHC 1980 to strike out a writ or a statement of claim as disclosing no reasonable cause of action should be exercised only in plain and obvious cases. In striking off the writ or pleadings on the ground that there is no reasonable cause of action, affidavit evidence is not admissible in support of the application and the Court must only scrutinize the writ and the pleadings of the parties.

[2] The Court was more than convinced that the allegations made in the statement of claim do disclose a reasonable cause of action as the plaintiff's cause of action is based on trespass to land simpliciter. It is trite law that trespass to land *per se* gives rise to an action in tort regardless of whether the landowner could or could not claim any damages. Therefore there is some ground to support the plaintiff's action regardless of the fact that he may not likely succeed when the case goes on to full trail. The contention of the defendants that there is no reasonable cause of action to sustain the present action of the plaintiff cannot be sustained and must on the principles and authorities be rejected.

[3] The defence of 'necessity' does not and cannot be accepted as sufficient to establish at this stage that the action of the plaintiff is frivolous or vexatious. The doctrine of necessity is nothing more than a defence available to the defendants and which can only be determined at the trial proper.

[4] It is the Court's considered opinion that whether a plaintiff did or did not by his conduct be precluded from alleging trespass on the part of the defendant is a serious question and that can only be determined at the trial of this action and it would be premature for the Court to determine this issue merely on affidavit evidence. In view of the conflicting evidence there is so much reason for this Court to deal with the points at the trial proper and not in this interlocutory proceedings.

[5] The Court is of the view that the plaintiff's claim for special damages cannot be sustained for it is well settled principle of law that particulars of special damages must be particularised and it is not sufficient to aver a bare assertion that the plaintiff had suffered special damages. The Court would therefore strike out the said prayer for special damages with liberty for the plaintiff to apply. In view of the above the application of the defendants to strike out the writ and the statement of claim is dismissed.

[Defendants' application to strike out writ and statement of claim dismissed.]

Cases referred to:
Rediffusion (Hong Kong) Ltd. v. A.G. of Hong Kong [1970] AC 1136
Wenlock v. Moloney [1965] 2 All ER 871
Mooney & Ors. v. Peat, Marwick, Mitchell & Co. & Anor. [1967] 1 MLJ 87
Borough of Southwark v. Williams [1971] 2 All ER 175
Young v. Holloway [1895] Pro Div 87

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19(1)
Rules of the Supreme Court 1957, O. 25 r. 4

For the applicants/defendants - Poh Ah Ley; M/s. Lim Huck Aik & Co.
For the respondent/plaintiff - Ahmad Farid; M/s. Radzi Sheikh Ahmad, Noor & Farid

JUDGMENT

Lim Beng Choon J:

This is an application for an order that the writ and the statement of claim be struck out pursuant to O. 18 r. 19(1) of the Rules of the High Court (encl. 5). The grounds for the application are

(1) There is no reasonable cause of action

(2) The action is frivolous and vexatious.

In considering the statement of claim in order to find out what is the cause of action relied upon by the plaintiff in support of the present action it is clear from para. 3 and 4 of the said statement of claim that his action is grounded on an allegation that the defendants had trespassed onto two parcels of land comprised in the titles HS (M) 51/84 and HS(M) 52/84 of which the plaintiff was the registered owner of the said land. It is further contended that the defendants had entered into the said land without the permission and consent of the plaintiff for the purpose of removing red earth therefrom and in so doing the defendants had also caused damage to the said land when in the course of their excavating the same they had created trenches and pot holes.

It is trite law that the summary power under O. 18 r. 19 to strike out a writ or a statement of claim as disclosing no reasonable cause of action should be exercised only in plain and obvious cases. The principle governing the exercise of this summary power is clearly explained in the case of *Rediffusion (Hong Kong) Ltd. v. A.G. of Hong Kong* [1970] AC 1136 at 1158 where Lord Diplock in delivering the majority judgment of the Privy Council in that case said:

> It is well-established principle that the summary power under RSC. O. 18 r. 19, to strike out a writ or pleading as disclosing no reasonable cause of action or defence should be exercised only in plain and obvious cause. This principle can be shown to be correct according to the evident intention of the rule for several reasons: (1) There is the reference to a "reasonable" cause of action or defence. (2) There is the context of "scandalous, frivolous or vexatious" and "prejudice, embarrass or delay the trial of the action" or "otherwise an abuse of the process of the Court" (3) The application is made at a very early stage of the action when the pleadings are not complete and no evidence have been adduced.

It is also to be noted that in striking off the writ or pleadings on the ground that there is no reasonable cause of action no affidavit evidence is admissible in support of the application and the Court must only scrutinise the following documents: the writ and the pleadings of the parties. See *Rediffusion (Hong Kong) Ltd. case* (*supra*) at p. 1159F. The scope of this proposition is also well exemplified in *Wenlock v. Moloney* [1965] 2 All ER 871 where it is stated at p. 873 as follows:

> It is said before this Court (and no doubt was said before the master) that the affidavits were put in not under (a) but under (b) and (d) of r. 19(1). If, as here, the only ground on which the action can be said to disclose no reasonable cause of action is that it is not one which is likely to succeed then I doubt whether the affidavit is admissible. There have been cases where affidavits have been used to show that an action was vexatious or an abuse of the process of the Court but not, as far as we have been informed, or as I know, where it has involved the trial of the whole action where facts and issues had been raised and were in dispute. **To try the issue in this way is to usurp the function of the trial Judge.**
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> (emphasis supplied)

A similar approach was adopted by our High Court in *Mooney & Ors. v. Peat, Marwick, Mitchell & Co. & Anor.* [1967] 1 MLJ 87. In that case the question before the Court was whether the Statement of claim ought to be struck out under O. 25 r. 4 of the old Rules of the Supreme Court as disclosing no reasonable cause of action. In dismissing the application Raja Azlan Shah J (as His Highness then was) stated at p. 88:

> It is firmly established that the power exercisable under r. 4 "is only appropriate in cases which are plain and obvious so that a Judge can say at once that a statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to the relief of which he asks for": see the judgment of Lindley MR in *Hubbuck & Sons v. Wilkinson, Heywood & Clark Ltd.* Where the situation arises, the pleadings and particulars alone shall be considered and all the allegations in it shall be presumed to be true, and it is only on that assumption that any statable case can be made for this application: see *Peck v. Russell.* The Court cannot and indeed is not empowered to look behind the pleadings and particulars if it discloses a reasonable cause of action. So long as the statement of claim discloses **some** ground of action the mere fact that the plaintiff is not likely to succeed on it at the trial is no ground for it to be struck out; see *Boaler v. Holder.* A recent exposition of the law is afforded by the judgment of Danckwerts LJ in *Wenlock v. Moloney.*

I shall now proceed to consider the present application made by the defendants bearing in mind the principles enunciated by the judgment in the cases which I have cited earlier. Upon a cursory glance of para. 3 and 4 of the statement of claim, I am more than convinced that the allegations made therein do disclose a reasonable cause of action. In saying so I took note of the fact that the plaintiff's cause of action is based on trespass to land simpliciter. It is trite law that trespass to land *per se* gives rise to an action in tort. There is therefore **some** ground to support the plaintiff's action regardless of the fact that he may not likely succeed when the case goes on to full trial (see the case of *Mooney & Ors. v. Peat, Marwick, Mitchell & Co. & Anor*. (*supra*)). It follows therefore, that the contention of the defendants that there is no reasonable cause of action to sustain the present action of the plaintiff cannot be sustained and must on principle and authorities be rejected.

As regards to the second ground namely that the present action is frivolous and vexatious, I was inclined to reject it in view of my finding that the plaintiff has a reasonable cause of action. But, however that may be, I restrained myself from rejecting the contention without a thorough consideration particularly when the defendants had filed in this Court four affidavits in support of their application and basing on the facts as stated in the said affidavits the learned defence Counsel in developing her submission raised three interesting points to sustain the contention that the plaintiff's action was frivolous and vexatious. Firstly the learned defence Counsel argued that as the defendants were given the go-ahead so to speak by the Government to carry out the road project which was necessary and urgent in the interest of the public, the defendants should be immune to any charge of trespass. In short she relied on the doctrine of necessity to shut out the plaintiff from approaching this Court to air his grievance. The short answer to this argument is that the defence of "necessity" does not and cannot be accepted as sufficient to establish at this stage that the action of the plaintiff is frivolous or vexatious. The doctrine of necessity is nothing more than a defence available to the defendants and which can only be determined at the trial proper - see *Borough of Southwark v. Williams* [1971] 2 All ER 175. Secondly the argument of the learned defence Counsel. (If I have not misunderstood her) rested on the fact that the plaintiff had by his conduct granted a licence to the defendants to enter onto his land comprised in the grant No. HS (M) 51/84. In this contention the learned defence Counsel mounted a two-pronged attack to reinforce that the action was frivolous and vexatious namely that (i) on 20 January 1986 the plaintiff went to his land and saw the works that were being carried out by the defendants and yet he did not take any action to stop the defendants from carrying on the works; neither did he raise any objection on the works that were being carried out by the defendants and (ii) on 5 February 1986 the plaintiff had entered into a written agreement with one Yap Chon Seng, who the defendants claimed to be a sub-contractor of the road-building project, allowing the said Yap Chon Seng to remove red earth from the defendants' land held under the title HS (M) 51/84. The learned defence Counsel therefore submitted that the plaintiff had by his conduct given a licence to the defendants to carry out the works on his land. He is therefore precluded from alleging any trespass on the part of the defendants. The plaintiff on the other hand filed a supplemental affidavit dated 9 March 1987 (encl. 17) in which he said that on his visit to his land on 20 January 1986 he had informed the defendants' representative that the defendants were trespassing on his land and he demanded that the defendants should pay him compensation for the trespass and damage in respect of the said land. The plaintiff went on to say in the said supplemental affidavit that at first the officer to whom he made the demand agreed to pay compensation in principle but after consultation with the JKR engineers he withdrew his agreement. Thereafter the plaintiff lodged a report at the Kuah police station. As regards to the allegation of the plaintiff

having entered with an agreement with Yap Chon Seng the plaintiff did not deny the making of the agreement with the said Mr. Yap nevertheless in his affidavit in reply dated 14 February 1987 (encl. 8) he asserted that the defendants were not a party to the said agreement. However that may be it is my considered opinion that whether a plaintiff did or did not by his conduct be precluded from alleging trespass on the part of the defendant is a serious question and that can only be determined at the trial of this action and it would be premature for me to determine this issue merely on affidavit evidence.At any rate I did take note of the fact that the plaintiff had instructed his solicitors to write to the defendants which they did on 12 February 1986 alleging that the defendants had committed a trespass to his land and that he demanded the defendants to move out of his land or alternatively to compensate him for damages caused to his land. In view of this conflicting evidence there is so much more reason for me to deal with these points at the trial proper and not in this interlocutory proceedings. Another point raised by the learned defence Counsel in support of this application was that the government had some time in September 1986 acquired the land and compensation had been awarded to the plaintiff in the sum of RM19,312.50. This award was made on 15 December 1986 and the plaintiff had accepted that sum as compensation for the acquisition of his land. In view of the acceptance of the compensation the learned defence Counsel therefore argued that the plaintiff having been fully compensated could not now come to this Court and claim for further compensation. In considering this contention it is worthy to note that in his statement of claim, the plaintiff alleged that the defendants committed a trespass to two parcels of his land held under titles HS (M) 51/84 and also HS (M) 52/84. The land acquired by the government was comprised in the title HS (M) 51/84 and the plaintiff's land under title HS (M) 52/84 was not acquired. In the circumstances I cannot see how the plaintiff could be precluded from moving this Court to consider the allegations made by him in his statement of claim notwithstanding the acquisition of the parcel of land held under the title HS (M) 51/84. In passing and without deciding, I may perhaps say that at the trial proper the plaintiff may not be able to prove any damages suffered by him and therefore he would be entitled to only a nominal damage in respect of the trespass alleged to have been committed by the defendants. But the significant point is this: trespass *per se* is an actionable tort regardless of whether the landowner could or could not claim any damages. In this connection I would refer to the case of *Young v. Holloway* [1895] Pro Div 87. One of the issues in that case was that the plaintiff there claimed he was entitled as next of kin in the distribution of the estate of one Thomas Holloway. His claim was based on the fact that in 1876 the deceased had made a will in which he was one of the beneficiaries. However in 1883 the deceased had made another will which had the effect of revoking the earlier will. The respondent there filed a motion to dismiss the action of the appellant on the ground that apparently no will of 1876 was likely to be produced to sustain the allegation of the appellant that he was a beneficiary of the said estate and the action of the appellant was frivolous and vexatious. In rejecting the contention of the respondent the Court of the Probate Division said:

> At present the plaintiff produces some evidence to establish the existence of such a will containing a legacy to him, and a conspiracy to suppress it; but there is nothing to indicate the amount of such legacy, nor, except in a very general way, the contents of the will. If, however, there be any truth in the statement that such a will was prepared in the manner alleged, **it may possibly be that further details of its contents may come to light**. It is so important not to shut out a litigant from what may, even possibly, be the assertion of **a just right**, that I cannot take on myself, at this stage, to say that this part of the case is so clearly frivolous that I should stop the proceedings.
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> (emphasis added)

The principle that can be distilled from that authority is that as long as a plaintiff can base his action on a cause of action recognisable by the Court he cannot be shut out from moving the Court to entertain his action notwithstanding that it might not possibly succeed at the end of the day.

However that is not the end of the matter as the learned defence Counsel in her submission also pointed out to me that the reliefs asked for by the plaintiff in prayer (a) of his statement of claim for an injunction to restrain the defendants from trespassing into his land and in prayer (b) where he asked for an order that the defendants do remove the machineries and implements thereon, cannot be sustained in view of the fact that the road project was completed and the defendants were no longer in occupation of the land. To this contention I fully agree. What had been done even if it were unlawful cannot be undone. In the circumstances the plaintiff's entitlement would comprise merely of a monetary payment by way of damages for the loss (if any) owed to him by the defendants' acts committed prior to the completion of the road over the land. I am also of the view that prayer (d) asked for by the plaintiff for special damages cannot be sustained for it is well settled principle of law that particulars of special damages must be particularised and it is not sufficient to aver a bare assertion that the plaintiff had suffered special damages. I would therefore strike out the said prayer (d) with liberty for the plaintiff to apply. In view of the above application of the defendants to strike out the writ and the statement of claim is dismissed subject to the 3 prayers which have been struck out for the reasons as stated above.

Also found at [1987] 2 CLJ 438